A

NORHAZENI AHMAD v. PP

HIGH COURT MALAYA, PULAU PINANG
LIM CHONG FONG JC
[CRIMINAL REVISION NO: 43-8-10-2016]
7 DECEMBER 2016

B

CRIMINAL PROCEDURE: *Criminal revision – Application for – Setting aside ruling by Sessions Court for charges to be tried together – Whether ruling in contravention of s. 170 of Criminal Procedure Code – Whether accused persons charged for same offence – Whether offences committed in same transaction – Whether ruling prejudicial to accused persons – Whether offences ought to be tried separately*

C

This was a criminal revision application brought by the first accused ('applicant') against the ruling of the Sessions Court made pursuant to the prosecution's application to have the Criminal Case No. 61R-07-09-2016 ('the first case') and Criminal Case No. 61R-05-06/2016 ('the second case') tried together. In the first case, the applicant was charged under s. 17(A) of the Malaysian Anti Corruption Commission Act 2009 ('MACC Act') for receiving a bribe of RM200 from one Azmi Osman on 26 May 2015. Whereas, in the second case, one Ridzuan Che Leh was charged under s. 17(A) of the MACC Act for receiving a bribe of RM400 from Azmi Osman in April 2015. It was contended by the applicant that it was wrong for the Sessions Court to rule that the first case and the second case be tried together by reason that the ruling did not conform with s. 170 of the Criminal Procedure Code ('CPC'). The applicant further contended that although the applicant had effectively been charged with the same offence jointly with Ridzuan Che Leh, both the offences were not in the same transaction to qualify within the intent of s. 170 of the CPC.

D

E

F

Held (setting aside ruling of Sessions Court):

G

(1) The court's power in a criminal revision application are found in s. 325 of the CPC, the object of which is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. (para 7)

H

(2) Both the applicant and Ridzuan Che Leh had been charged for receiving a bribe under s. 17(a) of the MACC Act and hence, they were charged for the same offence. However, based on the test applied in the case of *Jayaraman & Ors v. PP*, *ie*, (i) proximity of time; (ii) unity or proximity of place; (iii) continuity of action; and (iv) continuity of purpose or design, the offence as charged in the first case and the second case did not arise from the same transaction. (paras 14 & 15)

I

(3) The place and time of the act of receiving the bribe in each case were plainly and distinctly different and unconnected. The time difference of around a month was too long to be considered proximate in this case. It was further uncertain as to whether they relate to one and the same incident of Azmi Osman having illegally harvested mussels. There was also an obvious lack of commonality and/or continuing purpose between the applicant and Ridzuan Che Leh which was evident by the non-reference and reliance on s. 34 of the Penal Code in both charges by the prosecution. (para 16)

(4) The consequences of the ruling were prejudicial to the accused persons, and in the circumstances, the ruling was set aside. The Criminal Case No. 61R-07-09-2016 was ordered to be transferred and tried separately from the Criminal Case No. 61R-05-06-2016. (paras 17 & 18)

Case(s) referred to:
Chin Choy v. PP [1955] 1 LNS 17 HC ***(refd)***
Jayaraman & Ors v. PP [1979] 1 LNS 36 HC ***(foll)***
Noorazlina Shamsudin lwn. PP [2016] 1 LNS 564 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, ss. 163, 170(1), 325
Malaysian Anti-Corruption Commission Act 2009, s. 17(a)
Penal Code, s. 34

The Code of Criminal Procedure 1973 [Ind], s. 223(a), (d)

Other source(s) referred to:
Baljit Singh Sidhu, *Criminal Litigation Process*, 3rd edn, p 294
Mallal's Criminal Procedure, 6th edn, p I2947
Sohoni's The Code of Criminal Procedure, 1973 19th edn, pp 2261, 2670

For the applicant - S Anthonysamy; M/s Aziz Anthony & Co
For the prosecution - Ahmad Ghazali Muhamad Nadzri; Malaysian Anti-Corruption Commission, Pulau Pinang

[Editor's note: Appeal from Session Court; Criminal Case No: 61R-07-09-2016 & 61R-05-06-2016]

Reported by S Barathi

JUDGMENT

Lim Chong Fong JC:

[1] This is a criminal revision application ("application") brought by the applicant (first accused) against the ruling of the Sessions Court dated 7 October 2016 ("ruling") made pursuant to the prosecution's application dated 27 September 2016 to have Criminal Case No. 61R-07-09-2016 ("first case") registered in the Georgetown Sessions Court and Criminal Case No. 61R-05-06-2016 ("second case") registered in the Butterworth Sessions Court tried together in the Butterworth Sessions Court.

[2] In the first case, the applicant was charged as follows:

> Bahawa kamu pada 26 Mei 2015, jam lebih kurang 10.20 malam di kawasan gerai makanan berhampiran bulatan Queensbay Mall di Bayan Lepas, dalam Daerah Barat Daya, Dalam Negeri Pulau Pinang, sebagai seorang ejen kerajaan Malaysia iaitu Koperal RF 133004 yang bertugas di markas pasukan Polis Marin Wilayah 1, Batu Uban, Pulau Pinang telah secara rasuah memperoleh RM200.00 untuk diri kamu sendiri wang tunai daripada Azmi B. Osman (No. KP: 820427-07-5479) melalui Mustaffa Bin Hamat (No. KP: 690712-07-5053) sebagai dorongan untuk kamu melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu iaitu tidak mengambil tindakan ke atas Azmi B. Osman yang mengutip kepah dengan menggunakan tangguk bergalah atau kor bergalah tanpa lesen yang menjadi satu kesalahan di bawah Akta Perikanan 1985; dan dengan itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 17(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum dibawah Seksyen Akta yang sama.

[3] In the second case, a Ridzuan Che Leh was charged as follows:

> Bahawa kamu pada April 2015, jam lebih kurang antara 10.00 hingga 12.00 malam di kawasan perairan Kuala Bukit Tambun, dalam Daerah Seberang Perai Selatan, Dalam Negeri Pulau Pinang, sebagai seorang ejen kerajaan Malaysia iaitu Bintara Muda Maritim yang bertugas di Agensi Penguatkuasaan Maritim Malaysia (APMM) Daerah maritime 2, negeri Pulau Pinang telah secara rasuah memperoleh suatu suapan untuk diri kamu sendiri iaitu wang tunai berjumlah RM400.00 daripada Azmi B. Osman (No. KP: 820427-07-5479) melalui Mustaffa Bin Hamat (No. KP: 690712-07-5053) sebagai dorongan untuk kamu melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu iaitu tidak mengambil tindakan ke atas Azmi B. Osman yang dikatakan telah melakukan kesalahan mengutip kepah dengan menggunakan tangguk bergalah atau kor bergalah tanpa lesen yang menjadi satu kesalahan di bawah Akta Perikanan 1985; dan dengan itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 17(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum dibawah Seksyen Akta yang sama.

[4] Upon reading the application, I am satisfied that the ruling may *ex facie* be procedurally wrong and presently not appealable because of the definition of "decision" in s. 3 of the Courts of Judicature Act 1964: see also *Noorazlina Shamsudin lwn. PP* [2016] 1 LNS 564.

[5] I therefore fixed the application for hearing on 23 November 2016 and after having heard counsel of both parties on that day, I adjourned it for deliberation.

[6] After having duly deliberated and considered the interesting arguments of counsel, I now give my decision hereinbelow including the grounds thereto.

[7] First and foremost, my powers in a criminal revision application are found in s. 325 of the Criminal Procedure Code which reads:

325. Powers of judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction."

This has been succinctly explained by Hashim Yeop Sani J (later CJ (Malaya)) in *Public Prosecutor v. Kulasingam* [1972] 2 MLJ 26 as follows:

> The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to sub-sections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[8] In this application, Mr S Anthonysamy of counsel for the applicant submitted that it was wrong of the Sessions Court to rule that the first case and second case be tried together by reason that the ruling does not conform to s. 170 of the Criminal Procedure Code ("CPC") that reads:

170. When persons may be jointly charged

(1) When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or attempt to commit the same offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all the charges.

ILLUSTRATIONS

(a) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(b) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge charging both with the one theft and B alone with the two other thefts.

A (c) A and B, being members of opposing factions in a riot, should be charged and tried separately.

(d) A and B are accused of giving false evidence in the same proceeding. They should be charged and tried separately.

B (2) Persons accused of an offence which includes theft, extortion, criminal breach of trust, cheating or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last-named offence, may be charged and tried together.

C

[9] According to him, s. 170 is an exception to the general provision in s. 163 of the CPC which reads:

163. Separate charges for distinct offences

D For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

ILLUSTRATION

E A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

Thus he submitted that any non conformance or contravention of s. 170 of the CPC is an illegality and not a mere irregularity that can be cured following *Chin Choy v. PP* [1955] 1 LNS 17; [1955] MLJ 237. The applicant F would be prejudicially affected notwithstanding that it is expedient to try both cases in the same trial because of common prosecution witnesses.

[10] As to the contravention, Mr Anthonysamy submitted that the applicant has effectively been charged with the same offence, *to wit*: s. 17(a) of the Malaysian Anti Corruption Commission Act 2009 ("MACC Act") G jointly with Ridzuan Che Leh but both offences were not in the same transaction to qualify within the intent of s. 170 of the CPC.

[11] On the other side, DPP Ahmad Ghazali bin Muhamad Nadzri of counsel for the prosecution however submitted that the applicant and Ridzuan Che Leh were jointly charged for different offences in the same H transaction within the clear intent of s. 170 of the CPC.

[12] It seems to me the matter at hand calls for the interpretation and application of s. 170(1) of the CPC. In the textbook *Criminal Litigation Process* 3rd edn authored by Baljit Singh Sidhu, it is stated as follows at p. 294:

I [7.152] Section 170 of the CPC refers to the situations and offences where two or more accused may be tried jointly. It provides two situations where if the court thinks just, it may allow more than one accused to be tried jointly. Firstly, where they are accused of committing the same offence

or different offences in the same transaction; secondly where one is accused of committing an offence and the other of abetment or attempt to commit the same offence.

In the textbook, *Mallal's Criminal Procedure* 6th edn, it is stated as follows at p. I2947:

... Section 170 is the last of the exceptions to the second general rule laid down in section 163 and expressly mentioned as such in that section. This is the only section which deals with the joint trial of more than one person. Section 170(1) permits several persons to be charged and tried together in three different situations. Firstly, where there are several persons accused of the same offence; secondly where several persons were accused of different offences in the same transaction, and last of all where one person is accused of committing an offence and another of abetting or attempting to commit the same offence ...

[13] From both textbooks, it is regrettably unclear that if there is the same offence(s) committed by different accused persons, then whether the offence(s) must have been committed in the same transaction in order for them to be jointly tried. I think it must necessarily be so from my interpretation of s. 170 (1) of the CPC. This is seen in *Jayaraman & Ors v. PP* [1979] 1 LNS 36; [1979] 2 MLJ 88 wherein Harun J (later SCJ) held as follows with emphasis added by me:

The question then is whether these four charges can be tried together. The general rule is that every accused person should be charged and tried separately for every distinct offence: section 163 C.P.C. This general rule, however, is subject to four exceptions, *viz*.:

(i) Not more than three offences of the same kind committed within the space of 12 months may be tried together: section 164 C.P.C.

(ii) One trial for all offences committed by the same person arising out of the same transaction. There is no limit as to the number of charges that may be preferred against an accused person at such trial: section 165 C.P.C.

(iii) Where on the same set of facts several offences are disclosed and it is doubtful which particular offence to charge; the accused may be charged with all the offences disclosed or in the alternative for every such offence. There is no limit to the number of charges: section 166 C.P.C.

(iv) *Where several accused persons commit the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: section 170 C.P.C.*

In *Lim Yean Leong v. Public Prosecutor* [1940] MLJ 216 it was held by the Court of Appeal that these four exceptions are cumulative and not mutually exclusive. The Privy Council came to the same decision in *Babulal Choukhani v. Emperor* AIR 1938 PC 130. These authorities are fully discussed by the Court of Appeal in *Cheong Sik Kwan v. Public Prosecutor* [1959] MLJ 189.

> In the present case there are eight accused persons and four charges and their joint trial is forbidden by section 163 C.P.C. unless the case falls within one of the four exceptions. Section 164 C.P.C. does not apply because there are more than one accused and there are four charges. The only exception within which it could fall is section 170 C.P.C. The question arises whether the four offences charged were committed "in one series of acts so connected together as to form the same transaction" …

In this regard, I also observed that it had been made clear in ss. 223(a) and (d) Indian Code of Criminal Procedure 1973 respectively that persons may be charged and tried together if they are accused of the same offence committed in the course of the same transaction or persons accused of different offences committed in the course of the same transaction. Consequently, the authors in the Indian textbook *Sohoni's The Code of Criminal Procedure*, 1973 19th edn wrote as follows at p. 2670:

> "… The words "accused of the same offence" imply that all the accused should have acted in concert or association. They do not apply to a case in which the allegations against the accused are mutually exclusive ..."

[14] Consequently in respect of the application of s. 170(1) of the CPC to the facts herein, is the charge in first case and second case in respect of the same offence as contended by the applicant or different offence as contended by the prosecution?

In s. 2 of the CPC, it is stipulated as follows:

> "Offence" means any act or omission made punishable by any law for the time being in force.

This definition is independent of the specific or particular facts to support the offence in question. On this premise and since both the applicant and Ridzuan Che Leh have both been charged for receiving a bribe under s. 17(a) of the MACC Act, I hold that they are charged for the same offence.

[15] The follow on question is then whether the offence as charged in the first case and second case arose from the same transaction? The meaning of the same transaction has also been explained by Harun J in *Jayaraman & Ors v. PP (supra)* as follows:

> It was held in *Babulal Choukhani v. Emperor supra*, that the relevant point of time in the proceedings at which the condition as to sameness of accusation must be fulfilled is the time of accusation and not that of the eventual result. In other words the question must be decided at the time the charges are preferred. At this stage the only material before the court are the charges. In *Chin Choy v. Public Prosecutor supra*, the Court of Appeal held that the best test to apply is that laid down in *Amrita Lal Hazra v. Emperor* 42 Cal 957:
>
> > It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the

determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

Now, applying this test to the present case, a perusal of the charges show:

(i) Proximity of time - all the four offences were alleged to have been committed at the same time;

(ii) Unity or proximity of place - all the four offences were alleged to have been committed at the same place;

(iii) Continuity of action - all the four offences are the same and committed at the same time and place; and

(iv) Continuity of purpose or design - all the eight accused are charged with having committed all four offences and in all four charges the prosecution allege common intention by invoking the provisions of section 34 of the Penal Code.

[16] By applying the aforesaid best test, I am unable to affirmatively conclude that the offence as charged in the first case and second case arose from the same transaction. The place and time of the act of receiving the bribe in each case are plainly and distinctly different and unconnected. The time difference of around a month is in my opinion too long to be considered proximate here. It is further uncertain as to whether they relate to one and the same incident of Azmi B Osman having illegally harvested mussels. There is also the obvious lack of commonality and/or continuing purpose between the applicant and Ridzuan Che Leh. This is to me evident by the non reference and reliance on s. 34 of the Penal Code in both charges by the prosecution.

[17] The consequences of the ruling are in my view prejudicial to the accused and I can do no better than to refer to and reiterate *Sohoni's The Code of Criminal Procedure*, 1973 19th edn at p. 2661:

... If it is doubtful whether a given case can be brought under its provisions, it is preferable to deal with the offenders separately thereby avoiding the likelihood of any prejudice. Each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary, entitled to insist that his case be separately tried. In the eye of the law, each individual citizen is a separate integer or unit of the commonwealth, and his rights of liberty cannot, without express authority in the law, be dealt with jointly with those of other persons with whom, far from having a community of interest, he may have incompatibility of interests in matters of criminal nature.

On such general principles, in order to avoid the possibility of any prejudice to the accused and to ensure a fair trial which would be the paramount consideration, it is desirable that he accused be separately tried ...

[18] In the circumstances and for the foregoing reasons, I hereby set aside the Ruling. Criminal Case No. 61R-07-09-2016 is hereby ordered to be transferred and tried in the Georgetown Sessions Court separately from Criminal Case No. 61R-05-06-2016 which shall remain and be tried in the Butterworth Sessions Court.